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# UK Constitutional Law Association

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## Stephen Tierney: Canadian Constitutional Change 30 Years On: Notes from a Small Island



A number of events have been held recently in Canada to mark the 30<sup>th</sup> anniversary of the ‘patriation’ of the constitution through the (Westminster enacted) Canada Act 1982, schedule B of which contained the Constitution Act, 1982. The main developments encapsulated by the 1982 process were the return to Canada of the constitutional amendment formula, allowing the constitution to be changed internally without recourse to the (albeit symbolic) ratification by Westminster; and secondly, the entrenchment of the Charter of Rights and Freedoms within the Constitution Act, 1982. Two anniversary events, held last month in Montreal and Ottawa respectively, are particularly notable for the ways in which they each reflected very differently on these events, and in doing so encapsulated the very different perspectives which are still brought to bear on these processes in Quebec and the rest of Canada. These events and the anniversary they commemorate, if not offering direct lessons for current constitutional debates in the UK, are certainly worth reflecting upon in light of ongoing debates in this country concerning both devolution and bills of rights.

The conference in Montreal was held at Université du Québec à Montréal by the International Association of Québec Studies and was titled ‘The patriation of the Constitution, 30 years later. What we can do? Where do we stand?’. This title itself suggests a degree of dissatisfaction with the 1982 changes. And indeed the conference was in many ways a retrospective on the 1981 process whereby Prime Minister Trudeau, with the agreement of most provincial premiers, but minus crucially the consent of Quebec Premier René Lévesque, asked Westminster to complete the patriation process. The sense of injustice, fuelled by the outcome of two legal challenges to this process in the *Patriation Reference* and *Veto Reference* cases before the Supreme Court of Canada, which served to deny the necessity of securing Quebec’s consent to the process, still lingers. The SCC broke new ground in recognising a convention of substantial provincial consent to constitutional amendment but did not extend this to include the need for Quebec’s consent specifically. It also fell back on a category distinction between law and convention, meaning that, in any case, provincial consent would not be legally enforced to prevent patriation going ahead at the behest of the federal government.

In many ways the frustrating story of the 1980-82 process is that, despite the basis for so much agreement on substantive issues, a procedural failing has served to undermine the legitimacy of the Constitution Act, at least in the eyes of many Quebecers. There was broad consensus across Canada that the UK should play no further role in amending the constitution, there was scope for agreement on what a new amending formula would look like, giving effective vetoes to a number of Canadian regions or powerful provinces, and there was even the opportunity to arrive at an agreed bill of rights across the country. But the sense Quebec felt of being rail-roaded into the new arrangements

has meant that this level of substantive consensus has been seriously undermined for decades by a flawed process. In the UK of course constitutional changes have worked much more consensually in recent times, as we have seen with the Government of Wales Act 2006 and the Scotland Act 2012. But as we turn to the potentially more fraught engagement with constitutional change through a referendum in Scotland the Canadian experience of flawed constitutional process should be carefully considered.

The story of the Charter is interesting since, after 30 years, and despite the failings of the 1980-82 process, the Charter enjoys very high levels of support in Quebec as in the rest of Canada. Whereas the conference in Montreal focused upon patriation as failure, the event at the University of Ottawa – ‘Checking Our Constitution@30: The Influence of the Canadian Constitution and the Charter of Rights and Freedoms on Legislation, Identities and Federalism’, was much more a celebration, with a number of affirmations of the Charter emphasising its impact not only on the legal system and different areas of social policy, but upon the very identity of Canadians themselves. The Charter was held up as a totem of collective identity particularly for younger Canadians whose civic sense of belonging to the state has for thirty years been strongly shaped by an education process that has promoted the Charter and in doing so has helped embed this instrument within the popular imagination as an essential component of ‘being Canadian’. Again, as the UK reflects upon the much more attenuated sense of affiliation people have with the Human Rights Act, which after all incorporates a generic international instrument, and as debates proceed about a domestic bill of rights, it is important to remember that such an instrument, beyond the legal measures it might contain, can also assume a strong nation-building character. It is also pertinent to recall that the Charter emerged at a natural moment of constitutional change in 1982, whereas it is not clear that 1998 or indeed today represent propitious moments to mobilise widespread self-reflection by British citizens concerning their constitutional identity/ies. It is also vital to note that any debate about a bill of rights cannot be meaningfully separated from parallel debates about the multinational nature of the UK and changes in the devolved settlements. For example, how would such a bill or rights reflect the multiple national identities and the possibly varying priorities given to different values across the UK? Indeed, would such a bill be able to locate and reflect a set of pan-British values, how could such a process be undertaken and how could consensus be reached? Thirty years on, the Charter is clearly popular across the Canadian state, but the process by which it was constitutionally endorsed without Quebec’s consent demonstrates both how difficult it can be to frame a bill of rights for a multinational state, and how, if done badly, such a process can do more to harm than to foster nation-building within a demotically complex state.

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